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COLLECTIVE BARGAINING, EQUALITY AND MIGRATION: THE JOURNEY TO AND FROM BREXIT

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ABSTRACT

Bob Simpson has documented the evolution of collective labour laws in the United Kingdom (UK) over several decades and his scholarship reminds us of their intended and unintended consequences. In the highly politically charged context of the 2016 Brexit vote, this article considers how UK and EU laws have shaped the nature and scope of collective bargaining in the UK and, thereby, income differentials and equal treatment in the workplace. While it would be possible to provide for equality of treatment between local British and migrant labour in ways that reduce social tensions, instead we have witnessed the imposition of legal frameworks that place workers in a position of competition rather than solidarity. The mistrust of current forms of migration from the EU seems to have been one key part of the journey towards the Brexit vote. An important question is what comes afterwards. If Brexit does not proceed, we should be contemplating reform at both UK and EU levels; but the problems identified here seem unlikely to evaporate in the event of either 'soft' or 'hard' Brexit. The article concludes that the UK situation offers a salutary reminder to other European Union (EU) States of the dangers of dismantling systems of sectoral bargaining and mechanisms for extension of collective agreements.

1. INTRODUCTION – WHERE DID THE JOURNEY TO BREXIT BEGIN?

Bob Simpson has documented the legislative changes made to British collective labour law over several decades. His careful and detailed critical analysis offers us insights into how legislative and judicial initiatives that seek to restrict collective bargaining can have both intended and unintended results. For example, his empirical work with Jane Elgar has shown the potential distorting effects of legislative reforms relating to industrial action, alongside their multiple consequences.¹ This article argues that the legislative changes since the 1980s he has documented have had not only palpable effects on the British labour market, but also, in combination with EU law, consequences for our society and politics. These consequences are examined here with respect to the issues of inequality and migration. My emphasis is perhaps less on the close analysis of specific legislative provisions and case law offered by Bob's scholarship, and more on identification of the broader trends that have dominated UK and EU legal developments affecting collective bargaining and industrial action. In so doing, this article draws on the writing of industrial relations specialists and other social scientists who have engaged in empirical work, which provides evidence regarding the operation and effects of UK and EU law.

It seems evident, even to the collective labour lawyer, that the most significant legal development of 2016 was not the notorious Trade Union Act,² but the outcome of the Brexit referendum. On Thursday 23 June 2016, 52% of those who voted expressed the desire that Britain leave the European Union (EU). As the new Prime Minister, Theresa May, has said subsequently 'Brexit means Brexit', although the terms of negotiation still remain unclear.³ At the time of writing, a judgment has been delivered to the effect that Parliament must approve the terms on which any notice is given to leave under Article 50 of the Treaty on

¹ See J. Elgar and B. Simpson, 'The Impact of the Law on Industrial Disputes in the 1980s' (Centre for Economic Performance Discussion Paper 1994); and B. Simpson and J. Elgar, 'The Impact of the Law on Industrial Disputes Revisited: A Perspective on Developments over the Last Two Decades', this volume.

² See the special issue of the ILJ vol. 45(3) (2016).

³ <http://www.theguardian.com/politics/2016/aug/01/no-10-brexit-means-brexit-tory-peer-lady-wheatcroft-lords-delay> (accessed 9 November 2016); regarding current reports of splits in Conservative government cabinet, see <http://www.telegraph.co.uk/news/2016/10/08/cabinet-split-over-handling-of-brexit/> (accessed 9 November 2016); and <https://www.theguardian.com/politics/2016/oct/17/philip-hammonds-brexit-worries-point-to-cabinet-tensions> (accessed 9 November 2016).

European Union (TEU).⁴ Nevertheless, May's Government has indicated an intention to appeal to the Supreme Court and to deliver Article 50 notice in March 2017, as previously stated.⁵

Shortly after the Brexit referendum, a study by the Joseph Rowntree Foundation (JRF) found links between household income and support for a Leave vote. Those earning less than £20,000 per year were much more likely to vote for Brexit, which was consistent with past findings linking a lack of wage growth to support for the UK Independence Party (UKIP).⁶ Notably, the authors of the JRF report observed:

Groups of voters who have been pushed to the margins of our society, live on low incomes and lack the skills that are required to adapt and prosper amid a post-industrial and global economy, were more likely than others to endorse Brexit. Looking ahead it is likely that persistent and growing inequalities will strengthen this divide.⁷

Another factor in explaining voting preferences seems to be anti-immigrant sentiment. The JRF reported that 88% of people who supported Brexit also thought that the country should allow in fewer immigrants.⁸ It was not the level of immigration in a given geographical area which appeared to promote this sentiment (more cosmopolitan cities like London and Bristol were less likely to vote for Brexit), but rather whether there had been rapid levels of change which appeared to affect voters' job prospects and their terms of hire in the labour market. These were places such as the Midlands, the North and parts of Wales.⁹

⁴ *Miller and Dos Santos v Secretary of State for Exiting the European Union & ors* CO/3809/2016; CO/3281/2016 QBD, judgment as at 3 November 2016 available at: <https://www.judiciary.gov.uk/judgments/r-miller-v-secretary-of-state-for-exiting-the-european-union/> (accessed 9 November 2016).

⁵ See <http://www.bbc.co.uk/news/uk-politics-37868987> (accessed 9 November 2016).

⁶ M. Godwin and O. Heath, 'Brexit Vote Explained: Poverty, Low Skills and Lack of Opportunities' Joseph Rowntree Foundation (JRF), 31 August 2016, available at: <https://www.jrf.org.uk/report/brexit-vote-explained-poverty-low-skills-and-lack-opportunities> (accessed 9 November 2016).

⁷ *Ibid.*

⁸ *Ibid.* See also <http://www.newstatesman.com/politics/staggers/2016/07/four-ways-anti-immigration-vote-won-referendum-brexit> (accessed 9 November 2016); and also Gerard Delanty, 'Fear of Others: Social Exclusion and the European Crisis of Solidarity' (2008) 42 *Social Policy & Administration* 676, 677.

⁹ JRF report n.6 above.

In the aftermath of the referendum, there was a significant increase in the number of racially motivated attacks on perceived foreigners.¹⁰ Yet policy initiatives taken by the current Conservative government have failed to reduce nationalistic attitudes, and could even be alleged to have inflamed popular forms of prejudice. At present, for example, a census is underway which aims to document the numbers of ‘foreign’ children attending schools.¹¹ Despite the ability of parents to opt out, its creation has prompted fears, given recent use of such data for Home Office immigration and deportation purposes.¹² At the Conservative Party conference, the Home Secretary, Amber Rudd, announced that employers should be required to make public the numbers of ‘foreign’ workers employed by them, effectively to name and shame those not offering jobs to British workers,¹³ although Theresa May claimed shortly afterwards that there was never an actual policy to this effect.¹⁴ Further, instructions that non-UK nationals were not to offer academic expertise to the government on a consultancy basis regarding Brexit-related issues was leaked by the London School of Economics (LSE), although later strongly denied by the Foreign and Commonwealth Office.¹⁵

What then do these developments have to do with collective labour law? It is argued here that, while this receives little attention in contemporary debates, we are witnessing the social and economic effects of growing inequality, which are at least partially attributable to the gradual collapse in UK sectoral collective bargaining. Also driving anti-immigrant feeling may be the experience of greater exposure to competition from short-term migrant workers under the EU’s posted worker regime, while being unable to organise effectively to preserve

¹⁰ <http://www.independent.co.uk/news/uk/politics/brexit-racism-uk-post-referendum-racism-hate-crime-eu-referendum-racism-unleashed-poland-racist-a7160786.html> and <https://www.theguardian.com/society/2016/sep/07/hate-surged-after-eu-referendum-police-figures-show> (accessed 9 November 2016) which indicate a surge in hate crimes by 58%.

¹¹ <http://schoolsweek.co.uk/school-census-2016-how-should-schools-collect-nationality-data/> and <https://www.theguardian.com/education/2016/oct/08/boycottschoolcensus-why-parents-are-refusing-to-reveal-their-childrens-nationality> (accessed 9 November 2016).

¹² <https://www.theguardian.com/uk-news/2016/oct/12/individual-childrens-details-passed-to-home-office-for-immigration-purposes> (accessed 9 November 2016).

¹³ <http://www.telegraph.co.uk/news/2016/10/04/jeremy-hunt-nhs-doctors-theresa-may-conservative-conference-live/> (accessed 9 November 2016).

¹⁴ <http://www.independent.co.uk/news/uk/politics/theresa-may-denies-lists-of-foreign-workers-idea-was-ever-government-policy-a7357501.html> (accessed 9 November 2016).

¹⁵ <https://www.theguardian.com/politics/2016/oct/07/lse-brexit-non-uk-experts-foreign-academics> (accessed 9 November 2016).

jobs and promote better pay and conditions. Here, we return to Bob Simpson's observations regarding intended and unintended consequences.

Effective representation in trade unions, especially where there is sectoral bargaining, has the capacity to foster solidarity, flattens wage inequalities and assists in productivity.¹⁶ In the long journey to Brexit from the 1980s onwards, we witnessed a move away from sectoral bargaining in the UK alongside increasing restrictions on the right to strike, which was intended to boost the profitability of British employers.¹⁷ In the EU, in an endeavour to build a post-enlargement common market of 28 Member States, the Court of Justice sought to restrict industrial action and the application of collective agreements.¹⁸ The interaction of UK and EU laws has arguably had a profound chilling effect on trade union activities, when compared to other collective bargaining regimes more suited to the prescriptions of the Court and Posted Workers Directive.¹⁹ These regulatory strategies may exacerbate troubling inequalities in ways that benefit neither migrant nor domestic workers. Indeed, it appears that setting these two groups of workers in opposition has had profound social and political ramifications.

There are other possible and arguably preferable approaches to UK and EU industrial relations. An alternative might be, generally, to promote collective bargaining within the UK

¹⁶ See the summary of relevant literature in L. Hayes and T. Novitz, *Trade Unions and Economic Inequality* (London/Liverpool: Class/Institute of Employment Rights, 2014). See also J. Visser, 'What Happened to Collective Bargaining During the Great Recession?' (2016) 5:9 *IZA Journal of Labor Policy* available at <http://link.springer.com/article/10.1186/s40173-016-0061-1> (accessed 9 November 2016). He points to the effects of a decline in sectoral bargaining and absence of legal mechanisms for extension of collective agreements across a sector, discussed further below.

¹⁷ See W. Brown, S. Deakin and P. Ryan, 'The Effects of British Industrial Relations Legislation 1979-97' (1997) 161(1) *National Institute Economic Review* 69.

¹⁸ Case C-438/05 *International Transport Workers' Federation (ITF) and Finnish Seamen's Union (FSU) v Viking Line* [2007] ECR I-0779 (*Viking*); Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767 (*Laval*); Case C-346/06 *Rüffert v Land Niedersachsen* [2008] ECR I-1989 (*Rüffert*).

¹⁹ Directive 96/71/EC of the European Parliament and of the Council of 16.12.96 concerning the posting of workers in the framework of the provision of services [1997] O.J. L18/1 (hereafter *Posted Workers Directive*). See A. Bucker and W. Warneck (eds), *Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert* (Baden-Baden: Nomos, 2011); and J.E. Dolvik, L. Eldring and J. Visser, 'Setting Wage Floors in Open Markets: The Role of Social Partners in Europe's Multilevel Governance' in S. Evju (ed.), *Regulating Transnational Labour in Europe: The Quandaries of Multilevel Governance* (Oslo: University of Oslo, 2014).

so as to diminish inequalities of income. Secondly, migrant workers could be hired on terms equal to those in the domestic workforce, as is the basic principle advocated in International Labour Organisation (ILO) and United Nations (UN) Conventions,²⁰ as well as under EU law as regards free movement of workers.²¹ However, as we will see, this principle of equal treatment has not been fully operative in relation to temporary migrant work. Instead, in the wake of the financial crisis, what has come to be known as ‘posted work’ increased across Europe, with numbers rising by up to 44.4% since 2010 (or 1.9 million workers).²² Under EU law, only legislation or collective agreements of universal application or those generally applicable can set minimum rates of pay for posted work.²³ In the *Laval* case, action taken by Swedish trade unions to raise wages for posted workers in line with what counterparts were paid under the relevant collective agreement was found by the Court of Justice to be a breach of an employer’s freedom to provide services.²⁴ The UK has no mechanisms by which to achieve legislative status for collective agreements, so that employers bringing posted workers to perform a contract for services need pay only the statutory national minimum wage, rather than sectoral wages that might be set by collective bargaining. This has enabled employers (as service providers) to undercut what would otherwise have been regarded as the going rate for the job.²⁵

If Brexit were not to proceed, there would still be a strong case for reform of UK collective labour law and EU law concerning posting. Perhaps some might speculate that, on leaving the EU, the precarity experienced by UK low paid and unskilled workers would diminish alongside the exploitation of posted workers. However, for various reasons, the problems outlined here are not so easily cured by Brexit, regardless of whether this is ‘soft’ or ‘hard’ in nature. There is, instead, a potential lesson for EU Member States, namely not to dismantle

²⁰ For example, Article 6 of ILO Convention No. 97 concerning Migration for Employment (Revised) 1949; Article 10 of ILO Convention No. 143 on Migrant Workers (Supplementary Provisions) 1975 and Article 25 of UN International Convention on the protection of the Rights of all Migrant Workers and their Families 1990 (ICRMW).

²¹ Treaty on the Functioning of the European Union (TFEU), Article 45(2).

²² Commission Proposal to amend the Posted Workers Directive COM(2016) 128 final at 2.

²³ Posted Workers Directive n. 19, Art. 3(8) as interpreted in *Rüffert* n.18.

²⁴ *Laval* n. 18.

²⁵ See discussion of the East Lindsey and other disputes in C. Kilpatrick, ‘Laval’s Regulatory Conundrum: Collective Standard-Setting and the Court’s New Approach to Posted Workers’ (2009) *European Law Review* 844, also below at text accompanying ns 99 - 102.

but rather to re-establish systems of collective bargaining threatened during the sovereign debt crisis.

2. COLLECTIVE BARGAINING AND EQUALITY

A trade union seeks to represent the collective interests of the workers that constitute its membership. In this way, a union can counteract the superior bargaining power that the possession of capital and other wealth gives to the individual or corporate entity that is the employer.²⁶ Hence, in the UK, prior to 1982, as Lewis and Simpson noted:

dominant state policy in industrial relations reflected a collectivist ethic. This assumed that the only viable way in which workers could protect themselves from the inequality of the individual employment relation was through trade union organisation, and also that collectively regulated industrial relations benefited society as a whole as well as trade unionists.²⁷

Article 3 of ILO Convention No. 87 acknowledges that, in order to perform this role, trade unions have to be free ‘to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes’ without interference from public authorities.²⁸ In this way, solidarity between workers has the capacity to ‘create better treatment at work, transparency over the terms of that treatment and representation when agreed standards are not met or procedures not followed’.²⁹ This does not, of course, necessarily equate to the promotion of equal treatment on grounds of sex and race.

As regards sexual and racial discrimination, trade unions have had rather chequered histories. A trade union will reflect the views of its membership and, if these are sexist or racist, the collective bargaining strategies pursued are unlikely to lead to greater equality. So, in South Africa, whites-only trade unions protected certain privileges (‘the white standard’) for white

²⁶ See reference to the work of Otto Kahn Freund in P. Davies and M. Freedland, *Kahn-Freund’s Labour and the Law*, 3rd ed. (London: Stevens, 1983), 18.

²⁷ R. Lewis and B. Simpson, ‘Disorganising Industrial Relations: An analysis of sections 2-8 and 10-14 of the Employment Act 1982’ (1982) 11 ILJ 227 at 244.

²⁸ ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise 1948, Art. 3.

²⁹ Hayes and Novitz n.16 at 14-15.

workers in the labour market;³⁰ while, in the UK, male dominated trade unions secured collective agreements instantiating differential male and female wages (and bonuses).³¹ Nevertheless, the internal logic of trade unions, turning on the utility of solidarity, is such that the more representative they are, the more effective. Instead of an employer being able to divide and rule the workforce, to dictate terms and conditions that can be taken or left, unity in representation can lead to actual negotiation. So, some considerable time prior to the abolition of apartheid, many white workers joined forces with those of colour in the Congress of South African Trade Unions (COSATU) which was instrumental in organising protest and political change in South Africa.³² In the UK, the Trades Union Congress (TUC) adopted in 1981 a 'Black Workers Charter' and now campaigns actively on race-related issues.³³ Adoption of a 'Charter for Equality for Women within Trade Unions' came even earlier in 1979 and today women make up the majority of trade union membership. Black workers are more likely than white workers to be trade union members, with black female workers more likely still.³⁴ The TUC now has its first female General Secretary, Frances O'Grady, a development which arguably makes the institution more representative of its membership.³⁵ That is not to say that the workers that the TUC and its constituent unions represent are in any sense homogeneous. There are considerable challenges in regulating conflicts of interest, but

³⁰ J. Knight and M. McGrath, *The Erosion of Apartheid in the South African Labour Market: Measures and Mechanisms* (Oxford: Institute of Economics and Statistics, 1987) at 39; see for the beginnings of this type of activism *Murdoch v Bullough* (1923) TPD 495.

³¹ See L. Dickens, 'Collective Bargaining and the Promotion of Gender Equality at Work: Opportunities and Challenges for Trade Unions' (2000) 6(2) *Transfer* 193. Regarding the established bonuses for male workers, see *Allen v GMB* [2008] ICR 1407 (CA) discussed by S. Deakin, S. Fraser Butlin, C. McLaughlin and A. Polanska, 'Are Litigation and Collective Bargaining Complements or Substitutes for Achieving Gender Equality? A study of the British Equal Pay Act' (2015) 39 *Cambridge Journal of Economics* 381 at 390 – 392.

³² See S. Buhlungu, M. Brookes and G. Wood, 'Trade Unions and Democracy in South Africa: Union organizational challenges and solidarities in a time of transformation' (2008) 46(3) *British Journal of Industrial Relations (BJIR)* 439. Its current objectives are stated to be as follows: 'COSATU believes in a democratic society free of racism, sexism and the exploitation of the working class.' See <http://www.cosatu.org.za/show.php?ID=926&categ=> (accessed 9 November 2016). See also D. Budlender, *Gender Equality and Social Dialogue in South Africa* Working Paper 2/11 (Geneva: ILO, 2011) available at http://www.oit.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_150430.pdf (accessed 9 November 2016).

³³ See <https://www.tuc.org.uk/equality-issues/black-workers> (accessed 9 November 2016); see also S. Moore and S. Tailby, 'The Changing Face of Employment Relations: Equality and Diversity' (2015) 37(6) *Employee Relations* 705 at 708.

³⁴ Moore and Tailby (2015) n.33 at 708 – 709.

³⁵ See also the TUC Equality Audit Report 2016 at <https://www.tuc.org.uk/EqualityAudit2016> (accessed 9 November 2016).

the broader objective of solidarity as a source of bargaining power tends to prompt genuine attempts at inclusion.³⁶

In 1989, Bob Simpson made the prescient comment that ‘weakening trade unions will undoubtedly limit the achievement of equal pay for work of equal value... It is the pursuit of "equal value" through collective bargaining which will largely determine the effects of this change in the law in the long term’.³⁷ It emerges that, statistically, an employer that recognises a trade union for collective bargaining over pay and other terms and conditions is more likely to implement equal opportunities. Union recognition has been linked to employers offering financial assistance for childcare and opportunities to switch from full- to part-time work.³⁸ There is also evidence of a connection between union interventions and reduction of the gender pay gap.³⁹

In industries where there is a dramatic reduction in trade union membership and collective bargaining, the consequence would seem to be a reduction in income for workers.

International Monetary Fund (IMF) researchers observing this phenomenon are adamant that there is a causative connection.⁴⁰ Reasoning from first principles, a link would make sense. For example, the reason that sectoral collective bargaining leads to better outcomes for

³⁶ A.C.L. Davies, ‘“Half a Person”: A Legal Perspective on Organizing and Representing “Non-Standard” Workers’ in A. Bogg and T. Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford: OUP, 2014) offers a concerned and critical approach to the ability of unions and legislators to make provision for this diverse workforce. In the same volume, J. Fine, ‘Migrant Workers and Labour Movements in the US and the UK’ (at 67 – 95), while admitting the scale of the challenges, offers a more positive view of union attempts to engage with migrant workers as members.

³⁷ B. Simpson, ‘Women, Employment and European Equality Law by Christopher McCrudden’ (1989) 52(3) *Modern Law Review* 445 at 446.

³⁸ See H. Bewley and S. Fernier, ‘What Do Unions Do for Women?’ in H. Gospel and S. Wood, *Representing Workers: Union Recognition and Membership in Britain* (London/New York: Routledge, 2003) at 117.

³⁹ Eurofound, *Addressing the Gender Pay Gap: Government and social partner actions* (2010) <http://www.eurofound.europa.eu/docs/eiro/tn0912018s/tn0912018s.pdf>; and F.D. Blau and L.M. Kahn, ‘International Differences in the Gender Pay Gap’ (2003) 21(1) *Journal of Labor Economics* 106. See also Hayes and Novitz n.16 at 20-21.

⁴⁰ C. Holmes and K. Mayhew, *Are UK Markets Polarising?* SKOPE Research Paper No.97 (Oxford: SKOPE, 2010); B. Western and J. Rosenfeld, ‘Unions, Norms and the Rise in US Wage Inequality’ (2011) 76(4) *American Sociological Review* 513. See F. Jaumotte and C. O. Buitron, ‘Power from the People’ (2015) *Finance and Development* 29 - 31 available at: <http://www.imf.org/external/pubs/ft/fandd/2015/03/pdf/jaumotte.pdf> (accessed 9 November 2016).

workers is that employers ‘cannot easily escape collective agreements by switching to a non-union environment, at least when staying in the same sector and country’.⁴¹ Indeed, in some countries that have strong sectoral bargaining, like the Netherlands, attempts to cheapen wages through outsourcing can lead to the perverse outcome of an increase in trade union activities enhancing coverage in previously unrepresented modes of work, such as agency and fixed term contracts.⁴² Further, when there is ‘extension’ of a collective agreement, that is ‘explicit legislation mandating the government, a public agency or... the court to apply the collective agreement beyond its signatories’, levels of inequality in wages are further reduced.⁴³ Simultaneously, extension makes it ‘less risky for employers to sign a sectoral collective agreement as it exposes them less to below-standard competition’ and reduces consumer pressure for wages to drop.⁴⁴

3. THE TOXIC COMBINATION OF UK LEGISLATION AND EU LAW AFFECTING COLLECTIVE BARGAINING

The end-state equality in wages that follows from effective sectoral collective bargaining can be explained by the ways in which unions ‘help institutionalize norms of equity’.⁴⁵ The procedural ability to realise this equality agenda rests then on the scope for voice and inclusion within trade unions and collective bargaining structures. Arguably, in both the UK and EU contexts, this is what has been lost when those whose status is not formally that of ‘worker’ or ‘employee’ have been left outside statutory protections.⁴⁶ Further, the dismantling of UK collective labour protections when combined with EU law affecting the

⁴¹ Visser n.16 at 5.

⁴² Ibid., at 5-6.

⁴³ Ibid., at 6.

⁴⁴ Ibid.

⁴⁵ Western and Rosenfeld n.40 at 513. See also D. Checchi, J. Visser and H.G. van de Werfhorst, ‘Inequality and Union Membership: The Influence of Relative Earnings and Inequality Attitudes’ (2010) 48(1) *BJIR* 84.

⁴⁶ See M. Freedland and N. Kountouris, ‘Some Reflections on the “Personal Scope” of Collective Labour Law’, this volume; also V. De Stefano, ‘Non-Standard Work and Limits on Freedom of Association: A Human Rights-Based Approach’ (2016) ILJ dww034, forthcoming available at: <http://ilj.oxfordjournals.org/content/early/2016/10/18/indlaw.dww034.abstract> (accessed 9 November 2016); and T. Novitz, ‘Changes in Employment Status under Austerity and Beyond – Implications for Freedom of Association’ (2016) 39(1) *Dublin University Law Journal*, forthcoming, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2830472 (accessed 9 November 2016).

scope for collective bargaining, has arguably led to inequality and precarity in the British labour market which (as noted above) can be linked to the voting profiles of those who opted for Brexit.

A. UK collective labour legislation and its limitations

Scope for participation in collective bargaining can be influenced profoundly by the legislative framework, so that the reforms undertaken in the UK from 1981 onwards, designed to reduce the power of trade unions, remain of considerable relevance.⁴⁷ Bob Simpson offered contemporary commentary on these developments. Established forms of union organisation and recognition which had supported national-level sectoral collective bargaining were stripped away. Instead, preference was given to the entitlement of the individual to disassociate from the union.⁴⁸ The statutory recognition procedure introduced by New Labour favoured only enterprise bargaining and failed to offer an effective alternative for multi-employer bargaining arrangements.⁴⁹ Further, the substantive scope of lawful industrial action was gradually diminished, so that secondary action could not be taken in solidarity with the workers of another employer. To these restrictions were added extensive statutory requirements associated with notice and balloting supplemented by a Code of Practice.⁵⁰ Moreover, employers sought injunctive relief which they understood would be on the basis of *American Cyanamid* principles, namely an arguable case that the action was unlawful (whether on substantive or procedural grounds) and that the balance of convenience lay with the employer.⁵¹ While Elias LJ has now stressed the significance of the

⁴⁷ See P. Davies and M. Freedland, *Labour Legislation and Public Policy* (Oxford: Clarendon Press, 1993), ch. 9. In this respect, see also a partial rejection of some of the assumptions implicit in the theories of collective laissez faire, explained and examined in A. Bogg and T. Novitz, 'Recognition in Respect of Bargaining in the United Kingdom: Collective Autonomy and Political Neutrality in Context' in B. Creighton and A. Forsyth, *Rediscovering Collective Bargaining* (New York/London: Routledge, 2012).

⁴⁸ See Lewis and Simpson n.27 at 244; also B. Simpson, 'Freedom of Association and the Right to Organize: The Failure of an Individual Rights Strategy' (1995) 24(3) ILJ 235.

⁴⁹ See the Trade Union and Labour Relations (Consolidation) Act 1992, Schedule A1; also B. Simpson, 'Trade Union Recognition and the Law, A New Approach – Pts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992' (2000) 29 ILJ 193; and A. Bogg, *The Democratic Aspects of Trade Union Recognition* (Oxford: Hart, 2009).

⁵⁰ B. Simpson, 'Strike Ballots and the Law: Round 6' (2005) 34(4) ILJ 331.

⁵¹ N. Countouris and M. Freedland, *Injunctions, Cyanamid and the Corrosion of the Right to Strike in the UK*, UCL Working Paper, LRI WP 1/2010, UCL, London 2010.

internationally recognised right to strike in applying judicial discretion in such cases,⁵² so that the legislation is not to be interpreted strictly against trade union interests, there still remain considerable obstacles to taking industrial action.⁵³ These have, notably, been criticised by the European Committee of Social Rights (ECSR) in 2015.⁵⁴

The ECSR considers that the restrictions placed in the UK on the substance of lawful industrial action, the legislative requirement to give notice before holding a ballot and the limited protections given from dismissal together constitute a breach of Article 6(4) of the European Social Charter 1961. In particular, the Committee has said regarding the ban on secondary action:

The Committee considers that employees nowadays often do not work solely for and under the direction of a single clearly defined employer, as evidenced by outsourcing, working in networked organisations, the formation of inter-organisational partnerships, particularly in public services, but also more use of agency staff, secondments and joint partnership working. The result is a far more diverse and complex matrix of contractual relationships with workers who used to share the same employer being split amongst different employers, even while they may find themselves simultaneously brought together with workers from other industries under new employment arrangements. As a consequence, trade unions increasingly find themselves representing a workforce whose terms and conditions are to a large extent not determined by their direct employer.⁵⁵

In other words, UK legislation on secondary action leaves workers exposed and without forms of solidarity in collective bargaining, even though their employers could be regarded as closely related through contractual and other corporate ties. An attempt to challenge this aspect of British collective labour law under Article 11 of the European Convention on Human Rights was, however, unsuccessful.⁵⁶ The Trade Union Act 2016 did nothing to

⁵² *RMT v Serco Ltd* [2011] ICR 848 (CA) at [68] – [72].

⁵³ See B. Simpson, ‘The Labour Injunction and Industrial Action Ballots’ 42(1) (2013) ILJ 54; also Simpson and Elgar n.1, this issue.

⁵⁴ See the 2015 Conclusions of the European Committee of Social Rights (ECSR) XX-3, at 21 – 24.

⁵⁵ *Ibid.* See [http://hudoc.esc.coe.int/eng/#{\"ESCDcIdentifier\":\"XX-3/def/GBR/6/4/EN\"}}](http://hudoc.esc.coe.int/eng/#{\) (accessed 9 November 2016).

⁵⁶ (2015) 60 EHRR 10; on which see A. Bogg and K.D. Ewing, ‘The Implications of the RMT Case’ (2014) 43 ILJ 221.

ameliorate this situation but further added to the already complex balloting and notice requirements,⁵⁷ while also introducing new challenges for trade union political funds, facility time and check off, as well as a more problematic role for the Certification Officer.⁵⁸ Concerns raised by the International Labour Organisation (ILO) Committee of Experts as regards the scope of these additional restrictions had no notable impact on Conservative government policy.⁵⁹

As Ruth Dukes notes in her analysis of British contemporary labour law commentary, the reforms from 1981 - 1997 have been understood as ‘one element of a wider set of measures intended to effect a restructuring of the labour market’, so as to overcome inflationary pressures associated with collective bargaining and achieve market-led efficiencies.⁶⁰ Significantly, she offers an alternative (and preferable) constitutional perspective on the socially-embedded aspects of labour law.

It is perhaps doubtful whether the economic performance sought through a move away from national level sectoral bargaining was actually achieved,⁶¹ especially given the long term superior performance of countries like Germany which preserved sectoral bargaining alongside enterprise based works councils. Nevertheless, Margaret Thatcher’s initial reforms have had many of their intended effects on British industrial relations systems, stripping away the closed shop, sectoral bargaining and secondary action, so as to create extremely flexible labour market structures. Those changes have, in the main, been consolidated rather than ameliorated by subsequent legislation.

⁵⁷ See Trade Union Act 2016 (TUA), ss 2 – 10 as discussed by R. Dukes and N. Kountouris, ‘Pre-Strike Ballots, Picketing and Protest: Banning Industrial Action by the Back Door?’ (2016) 45(3) ILJ 337.

⁵⁸ TUA, ss 11 - 14. See A. Bogg, ‘Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State’ (2016) 45(3) ILJ 299; and S. Cavalier and Richard Arthur, ‘A Discussion of Certification Officer Reforms’ (2016) 45(3) ILJ 363.

⁵⁹ K.D. Ewing and J. Hendy, ‘The Trade Union Act 2016 and the Failure of Human Rights’ (2016) 45(3) ILJ 391; ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), *Observations on Freedom of Association and Protection of the Right to Organise Convention No. 87 1948 - United Kingdom* (2016).

⁶⁰ R. Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford: OUP, 2014) at 99; see also her over-arching analysis in ch. 5.

⁶¹ See Brown et al, n. 17.

The effects on social solidarity are palpable. Coverage by collective bargaining was at 82% in 1980, stood at 23% in 2011 and is probably 20% or less today.⁶² As at 2011, the Workplace Employee Relations Survey (WERS) also reported that in the private sector there is sectoral bargaining in only 6.7% of workplaces.⁶³ Levels of inequality of income and wealth are significant, with marked disparities between different geographical areas in the UK; the North, the Midlands and Wales being disproportionately affected.⁶⁴ The majority of those experiencing poverty are also ‘in work’, so the ways in which the labour market operates has considerable implications for their welfare, especially in the austerity-related reduction of state services which previously might have operated as a cushion.⁶⁵ Further, precarity in the workplace, through new forms of hiring, including false self-employment, agency work and new forms of hiring have reached such levels,⁶⁶ that the current Government has initiated a review of these working practices.⁶⁷ Social discontent is understandably high among low-income working people, mapping onto the Brexit data as to where votes to leave were concentrated, demographically and geographically.⁶⁸ This is not, however, the entire picture. It helps to explain sources of concern and dissent, but not the anti-immigrant sentiment that also spurred the vote.

⁶² Department for Business Innovation and Skills, Trade Union Membership 2012 (2013) Statistical Bulletin BIS/13/P77. See also K.D. Ewing, J. Hendy and C. Jones (eds), *A Manifesto for Labour Law: Towards a comprehensive revision of workers’ rights* (Liverpool: Institute of Employment Rights, 2016), at 18.

⁶³ See the 2011 Workplace Employee Relations Survey statistical data available at: <https://www.gov.uk/government/publications/the-2011-workplace-employment-relations-study-wers-transparency-data> (accessed 9 November 2016) CF. JRF n.9.

⁶⁴ The UK has the third highest levels of inequality in the EU after Greece and Spain. The richest 10% of households have 45% of the wealth, with 10% earning having an income of under £10,000 per year. See <https://www.equalitytrust.org.uk/scale-economic-inequality-uk>.

⁶⁵ See <https://www.jrf.org.uk/mpse-2015/work-poverty> (accessed 9 November 2016). Data regarding in-work poverty has been confirmed by the Institute for Fiscal Studies: <https://www.ifs.org.uk/publications/8371> (accessed 9 November 2016).

⁶⁶ See BIS Select Committee, *Employment Practices at Sports Direct: Third Report of Session 2016-17* available at http://www.publications.parliament.uk/pa/cm201617/cmselect/cmbis/219/219.pdf?utm_source=219&utm_medium=module&utm_campaign=modulereports (accessed 9 November 2016); also D Pyper and J Delebarre, *Zero-Hours Contracts* (2016) available at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06553> (accessed 9 November 2016).

⁶⁷ <https://www.theguardian.com/commentisfree/2016/oct/01/i-tell-theresa-may-working-lives-review-modern-employment-zero-hours-flexibility> (accessed 9 November 2016).

⁶⁸ See ns 6 - 9 above.

B. EU internal market law and its effects

Also relevant, then, has been the scope of EU law and its impact on the UK labour market. Ostensibly, the arguments for Brexit hinge on ‘free movement of workers’, an entitlement arising by virtue of what is now Article 45 of the TFEU, which requires *inter alia* ‘the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment’.⁶⁹ This is consistent with the standard principle of non-discrimination for those migrant workers entitled by law to reside and work in another country.⁷⁰ It is well-established that all EU workers are entitled to form and join trade unions in another EU Member State and to engage in collective bargaining and industrial action in the same way as other local workers. Such a worker ‘shall enjoy equality of treatment as regards membership of trade unions and the exercise of rights attaching thereto’.⁷¹ However, by virtue Article 153(5) of the Treaty on the Functioning of the European Union (TFEU), the legislative competence of the EU ‘shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs’. This exclusion is controversial, given competence regarding social dialogue and consultation rights, alongside the capacity of EU institutions to place limitations on access to association and strikes in the context of free movement.⁷²

In tabloid newspapers, there has been the expression of concern that workers from 27 other EU Member States have unrestricted access to the UK for work, as well as superior public services and benefit schemes. In reality, this has not been the case. The evidence suggests that immigrants, particularly from the European Economic Area (EEA) exercising free movement rights, make a substantial net contribution to the UK economy. They tend to come with skills, and contribute more substantially to the UK tax base than they draw on UK revenues.⁷³ This

⁶⁹ TFEU, Art. 45(2).

⁷⁰ See above n.20.

⁷¹ Article 8 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on Freedom of Movement for Workers within the Union L141/1, 27.05.2011.

⁷² Lord Wedderburn, ‘Consultation and Collective Bargaining in Europe: Success or Ideology?’ (1997) 26(1) ILJ 1; Lord Wedderburn, ‘Labour Law 2008: 40 Years On’ (2007) 36(4) ILJ 397; and T. Novitz, ‘The EU and the Right to Strike: Regulation through the Back Door and Its Impact on Social Dialogue’ (2016) 27(1) *King’s Law Journal* 46.

⁷³ C. Dustmann and T. Frattini, ‘The Fiscal Effects of Immigration to the UK’ (2014) 124(580) *The Economic Journal*, F593-F643; confirming findings in C. Dustman, T. Frattini and C. Halls, ‘Assessing the Fiscal Costs and Benefits of A8 Migration to the UK’ (2010) 31(1) *Fiscal Studies* 1.

seems to be appreciated by British workers in larger cities who have greater personal experience of the positive contribution that EEA immigrants make, as opposed to those in less cosmopolitan places where perceptions may be dominated instead by media treatment of the issues.⁷⁴

Certainly, the TUC has not taken the view that EU migrants exercising their free movement rights take British jobs, or sought to block their access to the UK labour market. Rather, the TUC and affiliated unions have sought to seek to recruit EEA migrants as members and to assist them in collective bargaining.⁷⁵ This is not always straightforward. The facts of the *Kalwak* case,⁷⁶ in which Polish ‘self-employed’ agency workers were dismissed for attempting to join a union, is illustrative of employer practices in this regard and the ongoing barriers for trade union recruitment.⁷⁷ The issues of language barriers and lack of trade union access to the workplace are compounded by the attempts made by certain employers to exploit a more vulnerable group of workers.

However, the more obvious difficulty regarding treatment of EU immigrants arises less in cases where workers are exercising their free movement rights, under which they are fully entitled to claim the same entitlements as British workers to trade union membership and combine with them in collective bargaining, but rather in relation to temporary ‘posted’ workers. Article 1(3) of the Posted Workers Directive envisages three ways in which posting can take place: through a contract between the undertaking employing the posted worker in one State and the party for whom the services are intended in another; via an inter-corporate transfer within a company or group of companies across EU national boundaries; or where an

⁷⁴ This may explain the London and Bristol votes in favour of Remain. See text accompanying ns 8 - 9.

⁷⁵ B. Anderson, N. Clark, and V. Parutis, *New EU Members? Migrant Workers’ Challenges and Opportunities to UK Trade Unions: A Polish and Lithuanian Case Study* (London: TUC, 2007); see also TUC, *Organising Migrant Workers: A National Strategy* (2006).

⁷⁶ *Consistent Group Ltd v Kalwak and others* [2008] IRLR 505 (CA); see also L. Barmes, ‘Learning from Case Law Accounts of Marginalised Working’ in J. Fudge, S. McCrystal and K. Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Oxford: Hart, 2012).

⁷⁷ One would, however, hope that the precedent established by the Supreme Court in *Autoclenz v Belcher* [2011] ICR 1157 (SC) on shams would assist in addressing the treatment of workers in that case; however, where independent contractor status is genuinely established, it seems that obstacles to entitlement to collective bargaining rights would remain. See n.46 above.

agency hires out a worker from one Member State to a user undertaking in another Member State.⁷⁸ In any of these scenarios, it is not the posted worker who is exercising rights to free movement, but the employer or agency which is exercising an entitlement to ‘freedom to provide services’ under Article 56 TFEU. Posting of workers is important in construction, manufacturing, road transport, processing and in various service sectors, including care, medical and business services. It also arises in terms of seasonal agricultural work.⁷⁹ Posting through agencies is also becoming a more common phenomenon,⁸⁰ although the most vulnerable remain the posted workers operating at the end of lengthy commercial supply chains.⁸¹

In this process, it is assumed that the law governing the employment relationship will normally remain that of the posted worker’s State of origin, with the host State (the UK) only being able to impose certain core terms and conditions as to the hire of such workers, as set out in Article 3 of the Posted Workers Directive. These terms concern provisions relating to pay, hours and holidays, health and safety, provision for pregnant workers and maternity leave, and equality of treatment between men and women, as well as ‘other provisions on non-discrimination’. As noted above, these are to be set through legislation, but also through collective agreement if of universal application or generally applicable.

Perhaps ironically, given the reference to ‘non-discrimination’ in Article 3(1), this approach allows discrimination between posted workers and workers of the host State (or, for our purposes, ‘British workers’). Equality law might have assisted in preventing discrimination on grounds of national origin, but the UK Supreme Court has recently found that discrimination on grounds of precarious immigration status does not fall under the ‘protected category’ of race. Consequently, temporary migrant status would be unlikely to qualify for protection on grounds of racial discrimination,⁸² meaning posted workers may legitimately be paid at lower rates than local workers for performing the same work (unless perhaps they

⁷⁸ Posted Workers Directive, n.19 above.

⁷⁹ European Commission, *Commission Staff Working Document, Impact Assessment*, Strasbourg, 8.3.2016 SWD(2016) 52 final, at 8.

⁸⁰ R. Andrijasevic and D. Sacchetto, “‘Disappearing Workers’: Foxconn in Europe and the Changing Role of Temporary Work Agencies’ (2016) *Work, Employment and Society* 1.

⁸¹ See n.79, at 14-15.

⁸² Joined cases *Onu v Akwiwu* and *Taiwo v Olaigbe* [2016] IRLR 719 (SC).

can come within the scope of statutory protections for temporary agency workers).⁸³ Moreover, the Posted Workers Directive, while recognising the potential role of collective agreements at setting their terms and conditions in the host State, gives them no express entitlement to join local trade unions or to engage in collective bargaining.

As noted above, in the *Laval* case, the European Court of Justice found controversially that industrial action taken by Swedish trade unions to persuade a service provider to comply with the terms of the local applicable Swedish collective agreement was in breach of the terms of the Posted Workers Directive and Article 56 TFEU.⁸⁴ While recognising a right to strike (under *inter alia* Art. 28 of the EU Charter of Fundamental Rights), the Court nevertheless significantly limited its scope, leading to criticism from the ILO.⁸⁵ The Court of Justice has indicated now that local trade unions may at least assist posted workers in individual claims regarding non-payment of wages to which they were clearly entitled.⁸⁶ That judgment maps onto the content of a Posted Workers Enforcement Directive of 2014, which make specific reference to the role of trade unions in the enforcement of posted workers' rights.⁸⁷ Nevertheless, the UK Regulations implementing this Directive (effective as at June 2016) do not mention the role of trade unions as agents for enforcement and are limited to the enforcement of posted workers' rights in the construction sector.⁸⁸

⁸³ See Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work; cf. Agency Worker Regulations 2010 SI 2010/93. For critical comment on the limitations of these regulatory instruments, see L. Vosko, 'Less Than Adequate: Regulating Temporary Agency Work in the EU in the Face of an Internal Market in Services' (2009) 2(3) *Cambridge Journal of Regions, Economy and Society* 395; N. Countouris and R. Horton, 'The Temporary Agency Work Directive: Another Broken Promise?' (2009) 38(3) *ILJ* 329.

⁸⁴ *Laval* n. 18; see also for exploration of the Nordic context for this decision, the work of the FORMULA project led by Professor Stein Evju in S. Evju (ed), *Cross-border Services, Posting of Workers, and Multilevel Governance* (Oslo: University of Oslo, 2013); and S. Evju (ed.), *Regulating Transnational Labour in Europe: The Quandaries of Multilevel Governance* (Oslo: University of Oslo, 2014).

⁸⁵ See *Observations on Freedom of Association and Protection of the Right to Organise Convention No. 87 1948 - United Kingdom* (2010) at 208–09; and Report (2013) at 196.

⁸⁶ See also Case 396/13 *Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna*, judgment of 12 February 2015.

⁸⁷ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') Text with EEA relevance (the Enforcement Directive), especially Art. 11(3).

⁸⁸ The Posted Workers (Enforcement of Employment Rights) Regulations 2016 SI 2016/539.

In response to successful challenges brought under EU law to the applicability in public procurement of minimum wages set by regional collective agreement and not instantiated in legislation,⁸⁹ German national and local government have taken legislative initiatives to give effect to differentiated sectoral wages.⁹⁰ This means that service providers are given sufficient notice as to the ‘mandatory rules sufficient to provide minimum protection’,⁹¹ such as the minimum wages that are due to be paid to posted workers in a particular sector or region. Those rates may exceed any bare national minimum wage, but still focus on the minima payable for work within a sector in ways that thwart what we might traditionally understand as the purpose of collective bargaining, which is to enhance workers’ welfare beyond such limited ambitions.⁹²

The UK has no system for the legal extension of collective agreements comparable to that adopted by Germany. There remains a presumption that collective agreements are not to be treated as legally binding *inter partes*⁹³ although terms and conditions from such a source may be incorporated into an individual contract of employment. Further, mechanisms for sectoral bargaining which might have enabled collective agreements of general application have been dismantled and, at present, no UK government has been prepared to contemplate the legal extension of collective agreements to all workers in a sector, setting differentiated minimum wages for particular work in a given sector, even though remains possible in countries like Germany and the Netherlands. This lack is the subject of proposals made by the Institute of Employment Rights in their *Manifesto for Labour Law*.⁹⁴

All migrant workers (whether temporarily posted to the UK, those who exercise their free movement rights or those in permanent residence) have an entitlement to what has come to be

⁸⁹ See *Rüffert* n. 18; also Case C-271/08 *Commission v Germany* [2010] ECR I-6817.

⁹⁰ The Court of Justice in Case C-115/14 *RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz*, judgment of 17 November 2015, recognised the legal effect of German regional legislation which set minimum wages to be applied in the context of public procurement decisions. Notably, although the regional legislation had drawn on rates set by a pre-existing collective agreement, there was at that time no such collective agreement. The rates were set solely by legislation.

⁹¹ *Rüffert* n.18, paras 32 – 34.

⁹² Kilpatrick n.25 at 853-4.

⁹³ TULRCA 1992, s. 179.

⁹⁴ Ewing et al n.62 at 20 – 21.

termed the minimum wage. However, as Bob Simpson noted shortly after introduction of the national minimum wage, and in the subsequent manifestations of its review, this offers a low base line of equality to be supplemented by superior collective bargaining structures.⁹⁵ If the norm for those posted temporarily is the minimum wage and not the collectively bargained wage, then there is scope for what the European Commission has observed, namely substantial undercutting of wages, which has depressive effects on wage rates locally, as well as pricing local workers out of jobs they previously expected to do.⁹⁶

It is the posted worker scenario, which enables employers to pay minimum wages rather than going rates for work, which may well have engendered economic shocks and resentments in areas, such as the North, the Midlands and in Wales, where it seems more of this type of posting has taken place, particularly in construction and processing.⁹⁷ The disruption that posted work arrangements can cause is perhaps best exemplified by the East Lindsey Oil Refinery dispute, which related to the ability of local workers to apply for jobs at the Lincolnshire oil refinery. A services contract had been awarded at the refinery to an Italian company, which undertook to supply its own skilled workforce, consisting of Portuguese and Italian workers. These workers were duly posted in and housed in isolated conditions on a barge moored in nearby Grimsby. Their wages and living conditions led local workers to be convinced that not only had they lost the ability to apply for jobs that would otherwise have been available to them, but that the cost of their labour was being undercut. This was an allegation that a subsequent ACAS investigation was unable to confirm or deny, despite an undertaking that had been given to pay the going rates.⁹⁸

The incident sparked spontaneous industrial action by British workers at East Lindsey and a number of sympathy walk outs in Grangemouth Oil Refinery, Aberthaw power station, near

⁹⁵ B. Simpson, 'The National Minimum Wage Five Years On: Reflections on Some General Issues' (2005) 33(1) ILJ 22.

⁹⁶ European Commission, *Commission Staff Working Document, Impact Assessment*, Strasbourg, 8.3.2016 SWD(2016) 52 final, at 13 and 36; see also the extensive research conducted by J. Cremers, *In Search of Cheap Labour in Europe: Working and Living Conditions of Posted Workers* (Brussels: CLR Studies: European Institute for Construction Labour Research, 2011).

⁹⁷ See JRF, n.9

⁹⁸ ACAS, *Report of an Inquiry into the Circumstances Surrounding the Lindsey Oil Refinery Dispute* (2009), para. 11.

Barry, South Wales, and a refinery in Wilton near Redcar, Teesside, to name only a few.⁹⁹ The dispute became notorious for the catch-phrase ‘British jobs for British workers’ used in the associated protests.¹⁰⁰ Workers could not be represented in the industrial action by a trade union as this would have been a clear violation of EU law, following the *Laval* case.¹⁰¹ Here, as subsequently, resentment came out of inequalities and was perhaps exacerbated by the absence of capacity for trade unions to be involved to mediate between different groups of workers and offer routes to reconciliation and solidarity.¹⁰²

Ongoing research in the field of temporary and seasonal posting to the UK indicate that employers prefer to employ cheaper posted workers while leaving local workers in an increasingly precarious position.¹⁰³ In this situation, UK trade unions are exceptionally cautious regarding industrial action in support of collective bargaining where posted workers are involved, or where indeed, any EU cross-border situation arises. This is due to the longstanding realization that an application for injunctive relief could be brought by the employer on substantive grounds that would be expensive to defend,¹⁰⁴ but also more significantly, the potentially unlimited liability that could arise under EU law.¹⁰⁵

⁹⁹ Discussed in L. Hayes, T. Novitz and H. Reed, ‘Applying the Laval Quartet in a UK Context: Chilling, Ripple and Disruptive Effects on Industrial Relations’ in Bucker and Warneck n.19.

¹⁰⁰ S. Morris, ‘‘Give Jobs to British People’’ say Aberthaw power station protesters’, *The Guardian*, 30 January 2009; L. Holmwood, ‘BBC Apologises for Misleading Edit of Striking Worker’, *The Guardian*, 6 February 2009.

¹⁰¹ See *Laval* n.18 above.

¹⁰² See for more detailed discussion of the dynamics of this situation, C. Barnard, ‘“British Jobs for British Workers”: The Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market’ (2009) 38(3) ILJ 245; and A. Ince, D. Featherstone, A. Cumbers, D. MacKinnon and K. Strauss, ‘British Jobs for British Workers? Negotiating Work, Nation, and Globalisation through the Linsey Oil Refinery Disputes’ (2015) 47 *Antipode* 139.

¹⁰³ S. Scott, ‘Migrant–Local Hiring Queues in the UK Food Industry’ (2013) 19(5) *Population, Space and Place* 459; G. Meardi, A. Martín and M.L. Riera, ‘Constructing Uncertainty: Unions and Migrant Labour in Construction in Spain and the UK’ (2012) 54(1) *Journal of Industrial Relations* 5.

¹⁰⁴ See Simpson ns 50 and 53.

¹⁰⁵ K. Apps, ‘Damages Claims Against Trade Unions After Viking and Laval’ (2009) 34 *European Law Review* 141; discussed also in T. Novitz and P. Syrpis ‘Viking and Laval: The United Kingdom Report’ in M. Freedland and J. Prassl (eds), *Viking and Laval and Beyond* (Oxford: Hart Publishing, 2014).

In this context, EU law on free movement aimed at completion of the common market coincided with the limitations of UK collective labour legislation aimed at flexibilisation of labour markets. In so doing, their collision seems to have led to inequalities of income and concerns regarding migrant work. This has arguably been an important stage on the journey towards Brexit.

4. CONCLUSION – HOW DOES THE JOURNEY END?

This article has sought to explain the ways in which the combination of UK collective labour law and EU free movement laws, each with their own distinct market objectives, have combined to exacerbate inequalities and conflicts (or at least perceived conflicts) of interest between groups of workers. Together, they have had the effect of setting migrant workers against local workers. Given what we know now of demographics and geographies, we might tend towards the conclusion that this generated or exacerbated forms of resentment which may have influenced the Brexit vote.

If Brexit does not take place, then there are clear and obvious steps that could be taken to promote greater access to collective bargaining, which would enable the reduction of inequalities of income and diminish tensions between ‘British’ and other workers. As UK unions have learnt, it is, of course, difficult to organise migrant workers, and even more difficult to encourage temporary posted workers to join unions and adequately protect their interests when they do so. Yet, representation of their voices is vital if collective bargaining is to operate in an inclusive and non-discriminatory way which genuinely promotes social solidarity. In this respect, the ‘diverse and complex matrix of contractual relationships’ an employer may have with discrete groups of longer-term, agency and posted workers pose obvious problems.¹⁰⁶ Also, by the time significant gains have been achieved, many of those on temporary hirings will have moved on.

Nevertheless, the experience of Dutch unions suggest greater rights of trade union access to the workplace can provide valuable assistance here, as can stronger laws enabling protection from victimization on grounds of trade union membership.¹⁰⁷ Experience in Finland suggests

¹⁰⁶ See the comments of the European Committee of Social Rights above at n.54.

¹⁰⁷ L. Bernstem and N. Lillie, ‘Hyper-mobile Migrant Workers and Dutch Trade Union Representation Strategies at the Eemshaven Construction Sites’ (2016) 37(1) *Economic and*

that trade union abilities to press for inspection of payment of wages and to take forms of boycott action against transgressing employers can also be helpful.¹⁰⁸ Further, while the *Laval* case places significant limitations on industrial action seeking to raise the wages of posted workers, a system of sectoral bargaining accompanied by legal extension of collective agreements could make a difference.¹⁰⁹ Such legal mechanisms will still set wages for posted workers at minimal rates of pay, but will be more sensitive to what is affordable for service providers in the job and the sector, so that where large profits are being made, posted workers are not only being paid the national minimum wage. Notably, sectoral bargaining has been most recently recommended by the Institute of Employment Rights as a key aspect of a *Manifesto for Labour Law*.¹¹⁰ At the very least, a system whereby trade unions are given the capacity to assist posted workers in their claims for unpaid wages is to be recommended.¹¹¹

That is not to say that reform is unnecessary at EU level. As various European academic commentators have observed, there is a strong argument that posted workers should have the same rights to freedom of association as those exercising free movement rights.¹¹² Despite the failure of the attempt to regulation in the form of a ‘Monti II’ Regulation,¹¹³ the European Commission has indicated the need to address the scale of posting, which seems to have doubled since 2010, alongside its divisive effects.¹¹⁴ One proposal is a new measure for ‘sub-contracting chains’ that would provide Member States with an option to apply remuneration

Industrial Democracy 171 at 179 where office hours on site made a difference; cf. M. Houwerzijl, ‘The Dutch Understanding of Posting of Workers in the Context of Free Services Provision and Enlargement: A Neutral Approach? Formula working paper no. 23, University of Oslo. In the UK, greater protection of trade union activity by agency workers could be of assistance – cf. *Kalwak* n.76 and *Smith v Carillion* [2015] IRLR 467 (CA). Ideally, access to the workplace would not be dependent on trade union recognition.

¹⁰⁸ N. Lille, ‘Subcontracting, Posted Migrants and Labour Market Segmentation in Finland (2012) 50(1) *BJIR* 148.

¹⁰⁹ Visser n.16 at 8;

¹¹⁰ See ns 62 and 94 above.

¹¹¹ See n.86 above.

¹¹² See, for example, M. Rocca, *Posting of Workers and Collective Labour Law: There and Back Again. Between Internal Market and Fundamental Rights* (Antwerp: Intersentia, 2015); and M. Schlachter, ‘Kollektive Rechte bei Arbeitsmigration und Entsendung’ in B.J. Mulder, M.J. Hotvedt, M. Nesvik and T.L. Sundet, *Sui Generis: Festschrift til Stein Evju* (Oslo: Universitetsforlaget, 2016) at 565.

¹¹³ Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services COM(2012) 130 final, 21.3.2012; discussed in C. Barnard, ‘Free Movement and Labour Rights: Squaring the Circle?’ in Evju (2014) n.19; and Rocca n.112 at 269 – 276.

¹¹⁴ See ns 22 and 96 above.

levels established at company level and other applicable collective agreements to any subcontractor where posting of workers is envisaged.¹¹⁵ This will ‘only be possible on a proportionate and non-discriminatory basis and would thus in particular require that the same obligations be imposed on all national sub-contractors’.¹¹⁶ Such a rule could, if introduced, have considerable impact on conditions for posted (and local) workers in the UK, given the current absence of sectoral bargaining and legislative extension of collective agreements. But, the Commission only intends such a regulatory measure to be optional and, in the event that a directive amending the Posted Workers Directive were adopted, there is no guarantee that any of the Member States (let alone the UK) would exercise their option to do so. The reluctant and partial implementation by the UK of the Enforcement Directive¹¹⁷ does not bode well for the adoption of such measures in Britain.

If Brexit lies at the end of the journey, then evidence would suggest that measures that promote collective bargaining and social dialogue would likely assist in promoting greater income equality and social cohesion. Repeal of the provisions in the Trade Union Act 2016 would be a useful starting point. However, Brexit by itself seems unlikely to remove the root causes of tensions between British and migrant labour. This is true of both ‘soft’ and ‘hard’ Brexit.¹¹⁸

If there is ‘soft Brexit’, which might allow the UK to gain access to the common market, but not the full range of social, environmental and other regulations associated with actual membership of the EU, the UK will still have to abide by free market principles, including the free movement of persons and the freedom to provide services. As a recent EEA case, *Holship Norge AS*¹¹⁹ illustrates, this would mean that restrictions placed on industrial action would continue (in that case in accordance with free movement of establishment and competition law principles); whilst the UK government’s voice regarding the regulation of posted work would be reduced.

¹¹⁵ Commission proposal at n.22 at 11-12.

¹¹⁶ Commission proposal at n.22 at 7-8.

¹¹⁷ See text accompanying ns 87-88 above.

¹¹⁸ A. Menon and B. Fowler, ‘Hard or Soft? The Politics of Brexit’ (2016) 238 *National Institute Economic Review* R4 at R8 – R10.

¹¹⁹ Case E-14/15 *Holship Norge AS v Norsk Transportarbeiderforbund*, judgment of the EFTA Court of 19 April 2016, interpreting Articles 31, 53 and 54 EEA. Available at: http://www.eftacourt.int/fileadmin/user_upload/Files/Cases/2015/14_15/14_15_Judgment_EN.pdf (accessed 9 November 2016).

Moreover, it is unlikely that ‘hard Brexit’, leaving the common market entirely, can offer a simple solution. While the UK would no longer be subject to EU law regarding free movement or the posted workers regime, similar scenarios are bound to arise. Any contemporary trade agreement relating to services is likely to contain provisions regarding temporary movement of natural persons, known under the General Agreement on Trade in Services (GATS), as ‘Mode 4’.¹²⁰ We know from the experience of other States, such as Canada and New Zealand (NZ), that many of the same issues connected to posted work regarding jurisdiction, pay and collective bargaining will arise. For example, in Canada, since 2006 the number of ‘temporary foreign workers’ on short term inter-corporate postings and seasonal circular agricultural visas has exceeded the number of longer term economic immigrants, which has led to genuine uncertainty as to the status of such workers under standard collective bargaining arrangements.¹²¹ At present, the UK has no capacity to record whether EU workers are exercising free movement rights or being ‘posted’; there may be much more of the latter than is currently thought. In NZ, there is current litigation concerning the application of a national level collective agreement to Chinese workers temporarily posted there.¹²² That dispute falls to be determined under the terms of a China – NZ Free Trade Agreement.¹²³

If the UK is to stand outside Europe, then we need to revisit the regime governing collective labour rights to generate forms of equal treatment that do not divide the workforce, but which can assist in fostering social and political harmony as they bolster mutual welfare. However, it has to be acknowledged that if we do indeed face ‘hard Brexit’, the UK government will be in the more difficult position of seeking to negotiate *ad hoc* individualized solutions to these problems, perhaps dealing with States like China, which have much more market power than

¹²⁰ See https://www.wto.org/english/docs_e/legal_e/26-gats.pdf (accessed 9 November 2016).

¹²¹ E. Tucker, ‘Intra-Company Transfers and Fissured Workplaces: *CS Wind* and the Challenge of Union Organizing in Canada’, Paper prepared for ReMarkLab Final Conference: New Foundations of Labour Law in the Globalised Market Economy? Stockholm, May 2016.

¹²² Ministry of Business, Innovation and Employment, *Summary of Labour Inspectorate Investigation of Alleged Breaches in Employment Standards of the Chinese Workers at KiwiRail’s Workshops* 17 April 2015; *the Rail and Maritime Transport Union (RMTU) v KiwiRail* [2015] NZERA Wellington 105, 5560304, determination of 30 October 2015.

¹²³ <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/china-fta/> (accessed 9 November 2016).

the UK. The scope to enhance our collective labour laws becomes further restricted, so that British workers' jobs and pay become more precarious, not less so.

Finally, the UK's current predicament offers the rest of Europe a cautionary tale. In the wake of the financial crisis and ensuing sovereign debt crisis, EU institutions have pursued deregulatory policies in relation to labour markets. These policies have been promoted through formal 'bailout' and financial assistance packages¹²⁴ and via the Country Specific Recommendations issued to Member States regarding their handling of their economies.¹²⁵ The tendency has been to recommend the abandonment of sectoral level bargaining (and legislative extension of collective agreements) in favour of enterprise level bargaining, often not involving trade unions at all.¹²⁶ Commentators like Maarten Keune are already observing the developments in inequality that have followed.¹²⁷ The UK story of the whittling away of collective bargaining and its consequences offers, at best, a salutary reminder that this is not a path that other EU States should follow.

¹²⁴ See C. Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future' (2015) 67 *Current Legal Problems* 199, 230.

¹²⁵ C. Hermann, 'Crisis, Structural Reform and the Dismantling of the European Social Model(s)' (2014) *Economic and Industrial Democracy* 1.

¹²⁶ Visser n.16 above. See also A. Koukiadaki and L. Kretsos, 'Opening Pandora's Box: The sovereign debt crisis and labour market regulation in Greece' (2012) 41 *ILJ* 276; S. Clauwaert and I. Schömann, *The Crisis and National Labour Law Reforms: A mapping exercise* ETUI Working Paper 2012.04; and A. Koukiadaki, I. Tavora and M. Martinez Lucio, *The Transformation of Joint Regulation and Labour Market Policy in Europe during the Crisis: Comparative Project Report* (University of Manchester/The European Commission 2014).

¹²⁷ M. Keune, 'The Effects of the EU's Assault on Collective Bargaining: Less governance capacity and more inequality' (2015) 21(4) *Transfer* 477; see also M. Keune and K. Vandaele, 'Wage Regulation and the Private Sector: Moving further away from a solidaristic wage policy' in J. Arrowsmith and V. Pulignano (eds), *The Transformation of Employment Relations in Europe: Institutions and Outcomes in the Age of Globalisation* (Routledge, 2013) at 88.